STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 14, 2009
v	No. 283459 Oakland Circuit Court
MARK ETHAN HATCHER, Defendant-Appellant.	LC No. 2007-212875-FC

Before: Wilder, P.J., and Meter and Hood, JJ.

PER CURIAM.

Defendant was convicted of two counts of armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a, first-degree home invasion, MCL 750.110a(2), conspiracy to commit first-degree home invasion, MCL 750.157a, felon in possession of a firearm, MCL 750.224f, and four counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced, as a second habitual offender, MCL 769.10, to 12 to 30 years in prison for each of his armed robbery convictions, 12 to 30 years in prison for his conspiracy to commit armed robbery conviction, 8 to 30 years in prison for his first-degree home invasion conviction, 8 to 30 years in prison for his conspiracy to commit first-degree home invasion conviction, three to seven and one-half years in prison for his felon in possession of a firearm conviction, and two years in prison for each of his felony-firearm convictions. He appeals as of right. We affirm.

Defendant's first argument on appeal is that he was denied his constitutional right to the effective assistance of counsel. We disagree. When reviewing a claim of ineffective assistance of counsel when an evidentiary hearing is not previously held, we conduct a de novo review of the existing record. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id*. at 302. Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207,

216; 528 NW2d 721 (1995). Counsel does not render ineffective assistance by failing to make a futile motion or argument. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

We reject defendant's argument that defense counsel was ineffective for failing to request a stipulation that defendant was previously convicted of an unspecified felony and was not entitled to possess a firearm. Defendant correctly notes that the trial court would have been obligated to honor such a request, thereby precluding the jury from hearing evidence regarding the "number and nature" of his prior convictions. *People v Swint*, 225 Mich App 353, 377; 572 NW2d 666 (1997). However, in this instance, defendant's prior felony was for fleeing and eluding, MCL 257.602a, the nature of which, compared to other felonies, is not a very serious offense. It follows that defense counsel's inaction in this regard, which prevented the jury from speculating that defendant's prior conviction may have been for a violent, more severe felony, similar to the charges pending against defendant, constituted sound trial strategy under the circumstances. Thus, even though defense counsel chose the alternative ground of stipulating to the fact that defendant had been previously convicted of the felony of fleeing and eluding, MCL 257.602a, which included two traffic misdemeanors, thereby exposing the jury to the nature of defendant's prior felony, it nonetheless follows that defense counsel's performance in this manner did not fall below an objective standard of reasonableness. *Toma*, *supra* at 302; *LaVearn, supra* at 216.

We also reject defendant's argument that defense counsel was ineffective for failing to move for a mistrial on the basis that the prosecutor introduced inadmissible "prior bad acts" evidence from a witness. Here, in response to the prosecutor's question to Reginald Peoples regarding whether he knew defendant, Peoples provided a non-responsive answer that he had met defendant when he, "Justin [Hatcher] and another friend went and picked [defendant] up from the other jail, the halfway – I don't know what it's called."

No evidence has been presented to suggest that the insinuated crime defendant might have been convicted of before Peoples picked him up from jail (or the halfway house), contained an element of dishonesty, false statement or theft, nor has it been established that the "crime" could be used to show "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident." However, even if it were further found that Peoples' testimony was offered to attack the credibility of defendant as a witness or to prove that he had a propensity to commit crimes, and thus, was inadmissible, MRE 404(b)(1); MRE 609, defense counsel nonetheless did not provide ineffective assistance when he failed to move for a mistrial on the basis that the jury heard the testimony. Defense counsel immediately objected to the testimony, and furthermore, the jury was (1) already aware that defendant had been previously convicted of a felony, (2) told that it should disregard the testimony, and (3) was instructed that it should not consider any evidence that had been stricken from the record. A jury is presumed to follow a judge's instructions, *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005), and instructions are presumed to cure most errors, *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). It follows that defendant was not prejudiced by Peoples's testimony, and thus, a mistrial would not have been warranted. See *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). Accordingly, defense counsel was not ineffective for failing to move for a mistrial on the basis that the prosecutor introduced inadmissible "prior bad acts" evidence from a witness. *Ish, supra* at 118-119.

We likewise reject defendant's argument that defense counsel was ineffective for interjecting "evidence of [defendant's] involvement in another alleged robbery." Here, in passing, Andrew Alspaugh implied that defendant might have robbed him on a prior occasion, testifying that he flashed money in front of defendant and Justin one night, but was not robbed *at that point in time*. During cross-examination, after Alspaugh testified that he had met defendant at a party, he testified that he had actually seen defendant on two occasions. Defense counsel asked when was the second time that he had seen defendant, which prompted Alspaugh's unforeseen answer, "when I got robbed." In an effort to minimize any prejudice from Alspaugh's testimony, defense counsel took it upon himself to further delve into Alspaugh's implication that defendant had previously robbed him by asking him questions about the prior robbery. In doing so, defense counsel successfully elicited testimony that the alleged robbery involved men with masks on, and that the only reason Alspaugh had to suspect that defendant was involved, was the fact that one of the men had the same shoes on that defendant was wearing the night Alspaugh met him. The record therefore establishes that defense counsel did not initiate the initial reference to a prior robbery, but rather, only further inquired into the incident in an effort to minimize the effect of the non-responsive reference to the incident.

We conclude that defense counsel's actions in this regard did not fall below an objective standard of reasonableness, and furthermore, was sound advocacy on behalf of his client. Moreover, any prejudice resulting from the aforementioned testimony was minimized by the trial court's subsequent instructions (at defense counsel's request) that the jury was "to disregard any testimony and/or evidence concerning an alleged armed robbery involving [Peoples] and/or [Alspaugh]." Accordingly, defendant was not denied his constitutional right to the effective assistance of counsel in this regard. *Toma, supra* at 302-303.

Defendant's next argument on appeal is that the trial court abused its discretion when it admitted Justin's out of court statement to the police into evidence. We disagree. We review a trial court's decision whether to admit evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Hearsay is defined as a statement, other than one made by the declarant while testifying at a trial or hearing, which is offered in evidence to prove the truth of the matter asserted. MRE 801(c); *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997). Hearsay is generally not admissible as substantive evidence unless it is offered under one of the exceptions to the hearsay rule. MRE 802; *Tanner, supra* at 629. Under MRE 801(d)(1)(B), a prior statement of a witness is not hearsay when the witness testifies at the proceeding, is subject to cross-examination concerning the statement, the statement is consistent with his/her testimony and the statement is offered to rebut a charge of express or implied recent fabrication, improper influence or motive. *People v Fisher*, 220 Mich App 133, 154; 559 NW2d 318 (1996). To be admissible as rebuttal to a suggestion of recent fabrication, a prior consistent statement must have been made before the motive to fabricate arose. *People v Jones*, 240 Mich App 704, 708-709; 613 NW2d 411 (2000).

Here, the testimony in question is Officer Robert White's testimony regarding custodial statements by Justin indicating that Justin, Nathaniel Fowler and defendant planned the robbery, while Fowler and defendant executed the robbery. Justin testified at trial and was subject to cross-examination. White's questioned testimony was consistent with Justin's trial testimony. Furthermore, on cross-examination, defense counsel questioned Justin regarding his motives to

testify and any consideration he received for his testimony. As such, we conclude that defense counsel's questions implied that Justin's trial testimony was fabricated in order to receive consideration during his own sentencing. Moreover, Justin testified that at the time he made his custodial statements to White, he had not been promised anything (i.e., the prosecution had not yet promised Justin that during his own sentencing he would receive consideration for his testimony), and thus, Justin's statements to White were made before his alleged motive to fabricate arose. Therefore, the trial court did not abuse its discretion when it allowed White's testimony into evidence under MRE 801(d)(1)(B). *Jones, supra* at 708-709; *Fisher, supra* at 154.

Defendant also argues that the prejudicial effect of the cumulative errors in this case mandates reversal. We disagree. Defendant failed to properly preserve this argument for appeal by making a cumulative error objection before the trial court. Therefore, we review this issue for plain error affecting substantial rights. *People v Carines,* 460 Mich 750, 764-767; 597 NW2d 130 (1999).

Because defendant has not established that any errors occurred, there can be no cumulative effect of errors that would merit reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999). Furthermore, as discussed, *supra*, the evidence presented clearly established that defendant and Fowler forcefully entered the victims' apartment, pointed a shotgun at them, "ransacked" their apartment, and stole some items from them. Therefore, we conclude that even if it were found that defendant has established errors, it could not be found that the cumulative effect of the errors amounted to plain error that affected his substantial rights to the extent that reversal would be required. *LeBlanc, supra* at 591; *Carines, supra* at 773.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood